



Daniel Styles
Via email: foi+request-5588-baa1c0e3@righttoknow.org.au

Dear Mr Styles

Freedom of Information request – Internal Review Decision

I refer to your correspondence received by the Department of Agriculture (**department**) on 26 October 2019 in which you sought internal review of the department's decision under the *Freedom of Information Act 1982 (FOI Act)* dated 21 October 2019.

My decision

I have decided to affirm the original decision made on 21 October 2019 to refuse access to two documents in scope of your request.

I have decided that the documents you have requested are exempt under the FOI Act as they:

- contain material which is subject to legal professional privilege (section 42);
- contain material that is deliberative matter, the disclosure of which would be contrary to the public interest (section 47C); and
- contain personal information, the disclosure of which would be contrary to the public interest (section 47F).

Please see **Attachment A** to this letter for the reasons for my decision.

Please see **Attachment B** to this letter for the relevant extracts from the FOI Act and guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**Guidelines**).

You can ask for a review of my decision

You may apply to the Office of the Australian Information Commissioner (**OAIC**) to review this decision. An application for review by the Information Commissioner must be made in writing within **60 days** after the day you are notified of this decision. You can also make a complaint to the Information Commissioner if you have concerns about how the department handled your request. You can find information about requesting a review, making a complaint, and other information about FOI on the OAIC website www.oaic.gov.au or phone the OAIC on 1300 363 992.

Further assistance

If you have any questions, please email foi@agriculture.gov.au.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'Tanya Howitt'.

Tanya Howitt
Assistant Secretary
Financial Management Branch
Finance and Business Support Division

25 November 2019

REASONS FOR DECISION

Background

On 20 August 2019, you contacted the department and requested the following documents:

' Documents created in 2019 concerning the matter of whether rent free housing provided to employees of the Department posted overseas should be treated as salary for superannuation purposes;

- Communications between the Department and the Department of Finance in 2019 concerning the matter of whether rent free housing provided to employees of the Department posted overseas should be treated as salary for superannuation purposes.'

On 2 September 2019, a charges notice was sent to you for the amount of \$27.30, for the costs incurred to the department for retrieving and collating the information requested, as the information you requested did not exist in a discrete form. You paid the full amount on 2 September 2019.

A decision was made on 21 October 2019 to refuse access to two documents. The decision maker determined that the documents, or parts of documents, that you requested were exempt under the FOI Act as they:

- contain material which is subject to legal professional privilege;
- contain material that is deliberative matter, the disclosure of which would be contrary to the public interest; and
- contain personal information, the disclosure of which would be contrary to the public interest.

You requested review of this decision on 26 October 2019, noting that

' I am not satisfied that the decision-maker has appropriately taken into account the public interest in releasing the relevant documents. It is in the public interest to disclose documents that go to the question of whether superannuation schemes that are ultimately publicly funded are being appropriately administered by relevant agencies. This public interest outweighs, and should have been determined to outweigh, the other considerations the decision-maker took into account.

- A mere reference to a legal advice or the fact that a document may be informed by legal advice does not render the document legally privileged.

- Even if sections of the document were legally priviled [sic], these could have been omitted and the remainder of the document (also excluding personal information) released.'

What I took into account

In reaching my decision, I took into account:

- your original request dated 20 August 2019;
- your request for internal review dated 26 October 2019;
- the documents that fall within the scope of your request;

- information about:
 - the nature of the documents; and
 - the department's operating environment and functions;
 - the original decision made by the department (LEX 2760);
 - the Guidelines; and
 - the FOI Act.

Reasons for my decision

I am authorised to make decisions under section 23(1) of the FOI Act.

I have decided that the documents you requested are exempt under the FOI Act. My findings of fact and reasons for deciding that an exemption applies to that document are discussed below.

As noted in the original decision, document one includes pages contained within a report that was prepared for the department by a third party. The relevant pages include information about an assessment of various superannuation allowances, as well as recommendations made by that third party in relation to various superannuation allowances.

Document two is a briefing minute addressed to the department's Chief Finance Officer. The briefing minute contains information related to document one, for example, advice and recommendations on the assessment of various superannuation allowances, as well as information about legal advice.

Section 47C of the FOI Act – Deliberative processes

Having considered the documents above, I agree with the original decision maker and have decided to apply the conditional exemption in section 47C to documents one and two in full.

In accordance with the FOI Act, I consider that the documents would disclose matter (deliberative matter) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of the agency.

I have considered paragraph 6.58 of the Guidelines and the explanation provided by Deputy President Forgie in the Administrative Appeals Tribunal (AAT) decision of *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 914 in relation to the meaning of deliberative process and the words 'opinion', 'advice' and 'recommendation'.

I consider that the material in the documents involve the weighing up or evaluation of considerations and are the 'thinking processes' of the agency.

On this basis, I am satisfied that the above mentioned documents contain deliberative matter for the purposes of section 47C of the FOI Act.

I am also satisfied that the documents concerned do not contain operational material as defined in section 8A of the FOI Act. Further, I am satisfied that the documents do not contain 'purely factual material'. To the extent that there is information which could be characterised as being factual, I consider that the information is intertwined and cannot be reasonably separated and forms an integral part of the deliberative content and purpose of the documents.

Given the above, I am satisfied that the documents are conditionally exempt under section 47C of the FOI Act.

Public interest considerations

I have weighed up the public interest for and against disclosure under section 11A(5) of the FOI Act.

In your request for internal review, you submit that the documents would go to the question of whether superannuation schemes are ultimately publicly funded, and whether they are being appropriately administered by relevant agencies. For the reason you outlined, I consider the disclosure would promote the objects of the FOI Act. Accordingly, there would be a public interest in the release of the documents.

However, I have also considered the relevant factors weighing against disclosure, indicating that access would be contrary to the public interest. I have considered the extent to which the disclosure may prejudice the department's ability to seek professional financial and legal advice in relation to matters which relate to the department's financial operations. I consider that disclosure could impact the department's ability to receive confidential advices, as well as the department's ability to properly consider the advice and recommendations.

You have submitted that the public interest outweighs, and should have been determined to outweigh the other considerations the decision-maker took into account. I have taken this into account, however, based on the above factors, I have decided that in this instance, the disclosure of the documents would, on balance, be contrary to the public interest.

I have not taken into account any of the irrelevant factors set out in section 11B(4) of the FOI Act in making this decision.

Conclusion

In summary, I am satisfied that documents one and two are conditionally exempt under section 47C of the FOI Act. Furthermore I have decided that on balance it would be contrary to the public interest to release this information.

Section 42 of the FOI Act – documents subject to legal professional privilege

The original decision maker decided that parts of document two were exempt under section 42 of the FOI Act relating to legal professional privilege.

Document two is a briefing minute addressed to the department's Chief Finance Officer.

I have considered document two, and I agree with the original decision and so I have applied the exemption in section 42 of the FOI Act to parts of the document.

Legal professional privilege is not defined in the FOI Act. To determine the application of section 42 of the FOI Act, consideration must be given to the common law concept of legal professional privilege. At common law, determining whether a communication is privileged requires consideration of:

- whether there is a legal adviser-client relationship;
- whether the communication was for the purposes of giving or receiving legal advice, or use in the connection with actual or anticipated litigation;

- whether the advice given is independent; and
- whether the advice given is confidential.

In your request for internal review, you submit that a mere reference to legal advice, or the fact that a document may be informed by legal advice does not render the document legally privileged.

I have considered your comments, and in my view, the parts of the document exempt under s 42 of the FOI Act reveal the contents of legal advice that was sought by the department. As the advice was independent and provided on a confidential basis, I am satisfied that the material is exempt under section 42 of the FOI Act.

You note that even if sections of the document were legally privileged, these could have been omitted and the remainder of the document (excluding personal information) released. I note that the remainder of document two which is not exempt either because of legal professional privilege or because it contains personal information, has been exempted under 47C of the FOI Act (relating to deliberative process).

Section 47F of the FOI Act - unreasonable disclosure of personal information

I agree with the original decision maker and have applied the conditional exemption in section 47F(1) to parts of document two.

Personal Information

The term 'personal information' is defined as follows:

'...information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and
- (b) whether the information or opinion is recorded in a material form or not.'

Paragraph 6.130 of the Guidelines provides:

'Personal information can include a person's name, address, telephone number, date of birth, medical records, bank account details, taxation information and signature.'

I find that document two contains the personal information of other people. This includes their phone numbers and signatures.

Whether disclosure is 'unreasonable'

In addition to the factors specified in section 47F(2) of the FOI Act, I have considered paragraph 6.127 of the Guidelines and the need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals.

I am satisfied that the disclosure of the third party personal information would be unreasonable as it relates to aspects of an individual's personal affairs and the information is private and not available in full or in part from publicly-accessible sources.

On this basis, I have decided that the personal information included in document two is conditionally exempt under section 47F(1) of the FOI Act.

Public interest considerations

When weighing up the public interest for and against disclosure under section 11A(5) of the FOI Act, I have taken into account relevant factors in favour of disclosure. In particular, I have considered the extent to which disclosure would promote the objects of the FOI Act.

I have also considered the relevant factors weighing against disclosure, indicating that access would be contrary to the public interest. In particular, I have considered the extent to which disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy.

I have also taken into account your submission that the public interest test was not appropriately considered by the original decision maker and that the public interest in disclosure should outweigh the public interest in not disclosing the material. However, based on the above, I have decided that in this instance, the public interest in disclosing the information in the above-mentioned documents is outweighed by the public interest against disclosure.

I have not taken into account any of the irrelevant factors set out in section 11B(4) of the FOI Act in making this decision.

Accordingly, I am satisfied that parts of document two, are conditionally exempt under section 47F(1) of the FOI Act. Furthermore I have decided that on balance it would be contrary to the public interest to release this information.

EXTRACTS FROM FREEDOM OF INFORMATION ACT 1982

Section 8A - Information to be published—what is *operational information*?

- (1) An agency's *operational information* is information held by the agency to assist the agency to perform or exercise the agency's functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities).

Example: The agency's rules, guidelines, practices and precedents relating to those decisions and recommendations.

- (2) An agency's *operational information* does not include information that is available to members of the public otherwise than by being published by (or on behalf of) the agency.

Section 11A - Access to documents on request

Scope

- (1) This section applies if:
- (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
 - (i) a document of the agency; or
 - (ii) an official document of the Minister; and
 - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.
- (2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
- (a) a conditionally exempt document; and
 - (b) an exempt document:
 - (i) under Division 2 of Part-IV (exemptions); or
 - (ii) within the meaning of paragraph (b) or (c) of the definition of **exempt document** in subsection 4(1).

Section 11B - Public interest exemptions - factors

Scope

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

Factors favouring access

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
 - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - (b) inform debate on a matter of public importance;
 - (c) promote effective oversight of public expenditure;
 - (d) allow a person to access his or her own personal information.

Irrelevant factors

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
 - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
 - (d) access to the document could result in confusion or unnecessary debate.

Guidelines

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

Section 23 - Decisions to be made by authorised persons

- (1) Subject to subsection (2), a decision in respect of a request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or, subject to the regulations, by an officer of the agency acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the responsible Minister or the principal officer of the agency.
- (2) A decision in respect of a request made to a court, or made to a tribunal, authority or body that is specified in Schedule 1, may be made on behalf of that court, tribunal, authority or body by the principal officer of that court, tribunal, authority or body or, subject to the regulations, by an officer of that court, tribunal, authority or body acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the principal officer of that court, tribunal, authority or body.

Section 42 – Documents subject to legal professional privilege

- (1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
- (2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.
- (3) A document is not an exempt document under subsection (1) by reason only that:
 - (a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and
 - (b) the information is operational information of an agency.

Note: For *operational information*, see section 8A.

Section 47C – Public interest conditional exemptions – deliberative processes

General rule

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (*deliberative matter*) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:
 - (a) an agency; or
 - (b) a Minister; or
 - (c) the Government of the Commonwealth.

Exceptions

- (2) Deliberative matter does not include either of the following:
 - (a) operational information (see section 8A);
 - (b) purely factual material.

Note: An agency must publish its operational information (see section 8).

- (3) This section does not apply to any of the following:
 - (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;

- (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;
- (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

Section 47F – Public interest conditional exemptions – personal privacy

General rule

- (1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).
- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:
 - (a) the extent to which the information is well known;
 - (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
 - (c) the availability of the information from publicly accessible sources;
 - (d) any other matters that the agency or Minister considers relevant.
- (3) Subject to subsection (5), subsection (1) does not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

Access given to qualified person instead

- (4) Subsection (5) applies if:
 - (a) a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information concerning the applicant, being information that was provided by a qualified person acting in his or her capacity as a qualified person; and
 - (b) it appears to the principal officer of the agency or to the Minister (as the case may be) that the disclosure of the information to the applicant might be detrimental to the applicant's physical or mental health, or well-being.
- (5) The principal officer or Minister may, if access to the document would otherwise be given to the applicant, direct that access to the document, so far as it contains that information, is not to be given to the applicant but is to be given instead to a qualified person who:
 - (a) carries on the same occupation, of a kind mentioned in the definition of **qualified person** in subsection (7), as the first-mentioned qualified person; and
 - (b) is to be nominated by the applicant.
- (6) The powers and functions of the principal officer of an agency under this section may be exercised by an officer of the agency acting within his or her scope of authority in accordance with arrangements referred to in section 23.
- (7) In this section:

qualified person means a person who carries on, and is entitled to carry on, an occupation that involves the provision of care for the physical or mental health of

people or for their well-being, and, without limiting the generality of the foregoing, includes any of the following:

- (a) a medical practitioner;
- (b) a psychiatrist;
- (c) a psychologist;
- (d) a counsellor;
- (e) a social worker.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

GUIDELINES EXTRACTS

6.58

A deliberative process involves the exercise of judgement in developing and making a selection from different options:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

6.127

The FOI Act shares the same definition of 'personal information' as the Privacy Act, which regulates the handling of personal information about individuals (see s 4(1) of the FOI Act and s 6 of the Privacy Act). The cornerstone of the Privacy Act's privacy protection framework is the Australian Privacy Principles (APPs), a set of legally binding principles that apply to both Australian Government agencies and private sector organisations that are subject to the Act. Detailed guidance about the APPs is available in the Information Commissioner's APP Guidelines.

6.130

Personal information can include a person's name, address, telephone number, date of birth, medical records, bank account details, taxation information and signature.